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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. INTRODUCTORY STATEMENT

In its principal brief, Hudgens submitted that, under what was urged to be the controlling test of *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), there had not been the requisite showing that "reasonable efforts by the union [to express its message] through other available channels of communication" (351 U. S. at 112) were unavailing. Pet. Br. pp. 18-

21. This fact was dispositive. There was no additional need to inquire as to the "quasi public" nature of Hudgens' North DeKalb Shopping Center or to ascertain whether the respondent Union's picketing had a direct relationship with that property's use. Absent a showing that the Union's desired audience was beyond the reach of available alternatives, regardless of the purpose of its communication or whether the Center was the functional equivalent of a public municipal facility, access by non-employee pickets on private Center property was not required by the National Labor Relations Act. Pet. Br. pp. 10-14, 16-18.

The Board, in response, has apparently abandoned both the *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793 (1945), approach it advocated before the Court of Appeals (Pet. App. pp. A6-A7),[1] as well as its previous acknowledgement that ["c]learly the test to be applied to the case at bar is that set out in *Babcock & Wilcox*" (Pet. App. p. A31).[2] Instead, the

1. The Board did not respond in its brief to Hudgens' arguments (Pet. Br. pp. 14-16) that *Republic Aviation* is inapplicable nor even cite, except for one passing reference (Bd. Br. p. 14), that case. The Union concurred with Hudgens' position. Union Br. p. 13 n. 1.

2. As noted in Hudgens' principal brief (pp. 7, 10), the Board initially relied on *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968), but, following *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972) and *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539 (1972), obtained a remand to reconsider its decision. On remand, the Board's Administrative Law Judge unequivocally declared that *Babcock & Wilcox* controlled (Pet. App. A31), a holding the Board did not disclaim. The Board, in fact, affirmed the Law Judge's decision "for the reasons specifically set forth in *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*, 203 NLRB No. 27", *enf. den. N. L. R. B.* v. *Visceglia*, 498 F. 2d 43 (3rd Cir. 1974) (Pet. App. p. A18), where it had held that *Central Hardware* mandated that it apply *Babcock & Wilcox*, not *Logan Valley* (83 LRRM at 1068). At no point did the Board seek to differentiate *Visceglia* on the ground that it involved an industrial park (cf. Bd. Br. p. 35 n. 26) or assert that the *Central Hardware* mandate applied only to instances where there was no "congruence between Section 7 and constitutional rights" (cf. Bd. Br. p. 18 n. 12). As noted before (Pet. Br. p. 12 n. 13), these contentions are impermissible *post hoc* rationalizations of Board appellate counsel.

Board now asserts that neither *Babcock & Wilcox* or *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539 (1972), have any application to the instant case. Bd. Br. pp. 16-17, 26 n. 20. Where, as alleged to be the instant case, private property has assumed "to some significant degree the functional attributes of public property devoted to public use" (Bd. Br. pp. 10, 17-18) the Board argues the applicable criteria are the constitutional principles formulated in *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968), and *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), and that such "*Logan Valley-Lloyd* criteria were satisfied here—*i.e.*, the picketing was directly related to the use of the shopping center, and no other reasonable opportunities for conveying the pickets' message to its intended audience were available" (Bd. Br. pp. 18-19). Thus, in contrast to the single standard of *Babcock & Wilcox*, the Board advocates a tripartite test: (1) the property in question must be analyzed to determine whether it has "acquired the characteristics of a public municipal facility" (Bd. Br. p. 21, quoting *Central Hardware*, 407 U. S. at 547)—if it has not, then *Babcock & Wilcox* is still controlling; (2) where there is such functional equivalence, then the proposed activity must be found to be directly related to the use to which the shopping center is being put (Bd. Br. pp. 11, 18) and (3) apparently in addition to the criterion of direct relationship (Bd. Br. p. 19, n. 13), there must be a demonstrated absence of available alternatives, albeit a less "stringent" showing than that required by *Babcock & Wilcox, i.e.*, "[o]n quasi public property, the relevant inquiry is not whether a consumer appeal may be made by means other than picketing and handbilling, but whether there are purely public locations where that activity can be carried on effectively without access to the quasi public property" (Bd. Br. p. 13).

The Union has taken a totally different tack, categorizing the Board's reliance on *Logan Valley-Lloyd* as "mistaken". Union Br. p. 20. In agreement with Hudgens, the Union asserts that, in a case arising under the Act, a constitutional

approach is precluded by *Central Hardware*. There is disagreement, however, as to the approach that should be utilized. Disavowing the *Babcock & Wilcox* test, since that standard "was developed to govern in organizing campaigns" (Union Br. p. 13), the Union proposes a rule that would grant a union the absolute right to engage in peaceful primary picketing on private property; such picketing "cannot be set aside on the theory that other alternatives . . . are a sufficient substitute" (Union Br. p. 7). The Union would thus find in every instance, apart from organizational campaigns, that the Act permits non-employee access to private property. Only in organizing situations would a union be obligated to show the absence of available alternatives.

As discussed hereafter, both the Board and the Union err in their contentions. There must be due regard for both a union's statutorily protected right to communicate and the "long-settled rights of private property protected by the Fifth and Fourteenth Amendments" (*Central Hardware*, 407 U. S. at 547). The Union's absolute rule, however, would *always* open private property to non-organizational primary picketing. The Board, conversely, would employ a multi-faceted test with different results dependent on whether the forum selected is "quasi public" property, or there is a message directly related to the use of that property, or there are available "purely public locations" where the desired activities could also be effectively conducted. *Babcock & Wilcox*, however, as *Central Hardware* teaches, provides a much simpler "guiding principle for adjusting conflicts between § 7 rights and property rights: . . . the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights." 407 U. S. at 544-545. Only where "a union has no other means at its disposal to communicate . . . other than to use the employer's property", does the Act mandate access. *Id.* at 548 (dissenting opinion). As also shown below, the Union here did not meet this test.

II. ARGUMENT

A. The Board's Erroneous Approach

1. The Board would disregard the statutory criteria of *Babcock & Wilcox* wherever "the property involved is the functional equivalent of a business block". In such a case the Board argues that "it is reasonable and proper . . . to apply the criteria mandated by the Constitution". Bd. Br. p. 17. There are fundamental defects in this position: it misconstrues *Central Hardware;* it would lead to an undesirable administration of the Act; and even assuming *arguendo* it were a correct principle, the DeKalb Center has not assumed "to some significant degree the functional attributes of public property devoted to public use."

As discussed in Hudgens' principal brief (pp. 12-14), prior to its present position, the Board acknowledged that *Central Hardware* precluded the application of constitutional criteria to *all* statutory cases regardless of the nature of the property involved. For example, in holding that, absent compliance with *Babcock & Wilcox*, the owner of a "small shopping center" could forbid union picketing thereon, the Board declared that "[i]rrespective of what the Board may have held prior to . . . *Central Hardware*", citing *inter alia* its initial decision in this case, "the law is now settled that *Logan Valley* decided *only* constitutional issues, not Section 7 rights . . ." (emphasis the Board's).[3]

3. *S. E. Nichols of Ohio, Inc.*, 200 NLRB 1130, 1131 (1972), which involved picketing and handbilling in front of the entrance to the largest (60,000 to 75,000 square feet) of five contiguous stores in a shopping center complex containing a common parking lot maintained by the lessee of that store. The Board would distinguish this case, as "purely private property", relying on its Law Judge's view that the *Nichols* center was "more akin to the single company and single parking lot situation". Bd. Br. p. 21 n. 14, citing Pet. App. A26 n. 1. This distinction, however, is one that is undiscernible

(Footnote continued on next page)

This is the correct reading of *Central Hardware*. That decision did not hold, as the Board now urges, that there should be one rule for "quasi public" property and another for "purely private property". Rather, as both the majority and dissenting opinions in *Centarl Hardware* emphasize, *Logan Valley* was inapplicable to that dispute, and is similarly irrelevant here, because, while *Logan Valley* involved "labor picketing, the decision rests on constitutional grounds; it is not a § 7 case. . . . [*Logan Valley*] does not purport to interpret the National Labor Relations Act . . .". 407 U. S. at 545; *id.* at 548 (dissenting opinion). The Board's argument in *Central Hardware*, as in the present case, was that "the character and use of Central's parking lots distinguished the case from . . . *Babcock & Wilcox* . . . and brought it within the principle of . . . *Logan Valley*." *Id.* at 542. In rejecting this argument, the Court emphasized not only the different factual setting of *Logan Valley* and *Central Hardware*, but also the different legal framework of the cases. It is this latter distinction which the Board now ignores.

Differentiating *Central Hardware* on the basis of the property involved would also lead to anomalous results. The owner of a large single standing store set off from public highways and surrounded by parking facilities for 350 automobiles such as Central Hardware, or of a small shopping center as in *S. E. Nichols*, or of other multi-enterprise retail establishments such as discount houses or large department stores, would, where the standards of *Babcock & Wilcox* had not been met, be immunized from picketing, handbilling or non-employee union solicitation. Conversely, the owner of a large shopping center

(Footnote continued)
from the *Nichols* opinion and in conflict with the pre-*Lloyd* decisions of various state courts which did not treat similar locales any different from Logan Valley Plaza. See, *e.g.*, *Lada* v. *Barbers Local 149*, 71 LRRM 3179 (Pa., Erie Cty. Ct. C. P. 1969), and *My's Restaurant, Inc.* v. *Hotel, Motel, Restaurant and Bartender Union, Local 571*, 76 LRRM 2393 (Wis. Cir. Ct. 1970). It is also a distinction which is manifestly contrary to *Lloyd's* repudiation of different standards predicated on the size or situs of retail establishments.

would, because of "being large or clustered with other stores in a modern shopping center" (*Lloyd*, 407 U. S. at 569), possess entirely different property rights. This is the very definitional dichotomy against which *Lloyd* admonished: "In terms of being open to the public, there are differences only of degree—not of principle—between a free-standing store and one located in a shopping center, between a small store and a large one, between a single one with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping." *Id.* at 565-566.

Even accepting, however, the Board's contention (Bd. Br. pp. 19-21) that there are substantial similarities between the DeKalb and Lloyd Centers,[4] the Board does not recognize that *Lloyd* and *Central Hardware* substantially modified the concept of functional equivalence. As the Seventh Circuit recently observed, those decisions carefully drew a distinction "between classic 'company towns' and such 'modern economic phenomenon' . . . as a shopping center."*Illinois Migrant Council* v. *Campbell Soup Company*, 519 F. 2d 391, 396 (7th Cir. 1975). Where, as in this case, there is "property, otherwise private, upon which the public is invited for certain limited and designated purposes" (*Id.* at 595), *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the "genesis" of *Logan Valley* (*Central Hardware*, 407 U. S. at 545), is inapplicable. "[S]uch property cannot be thought of as a 'company town'." *Illinois Migrant Council*, 519 F. 2d

4. As noted in Hudgens' principal brief (p. 4 n. 3; p. 5 n. 5), the DeKalb Center is operated solely by Hudgens and is clearly marked and maintained as private property. App. pp. 111-112, 115-116, 120-121. Like other retail and service enterprises, Hudgens must perform various functions, such as security, parking lot regulation, sanitation and maintenance, which a municipality may perform for a home-owner; Hudgens, however, receives no special consideration and is subject to the same requirements as any other private property owner. App. pp. 150-154. Moreover, in contrast to *Lloyd*, in the instant case there has also been no municipal vacating of streets or intertwining of the Center with public property, or use of the Center for a variety of public functions, or employment of security guards with full police powers. See 407 U. S. at 554; *id.* at 575-78, 578-79 (dissenting opinion).

at 395. The factors isolated by the Board[5]—the size of the Center and situs of the store in an enclosed central building separated by parking facilities from public streets—do not automatically convert a shopping center into "a public municipal facility". Here, as in *Lloyd*, "there has been no such dedication of [Hudgens'] privately owned and operated shopping center to public use" as to entitle the Union to access. 407 U. S. at 570. In neither case has the Center taken on "*all* of the attributes of a state-created municipality . . . performing the *full* spectrum of municipal powers and [standing] in the shoes of the State." *Id.* at 569 (emphasis added.)

2. The Board asserts that a failure to apply constitutional criteria "would lead to the anomaly that employees could obtain greater protection for their right to strike and peacefully picket by court suits than they could by invoking the procedures of the National Labor Relations Act. . . ." Bd. Br. p. 17. This argument presupposes, first, that the Board has been divested of exclusive jurisdiction—a question left undecided by this Court in *Logan Valley* and *Taggart* v. *Weinacker's*, 397 U. S. 223 (1970), and resolved in favor of preemption by the Georgia Supreme Court in the companion Hudgens case pending before the Court on petition for certiorari in No. 74-1032. Second, even if state courts are not preempted, and potential conflict is a viable possibility, this may simply be the price to pay in order to redress demonstrable wrongs and avoid a no-law area. See *Taggart*, 397 U. S. at 227-228. (Burger, C. J., concurring); Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1361-63 (1972). Finally, again assuming concurrent jurisdiction, there is no assurance that "greater protec-

5. Bd. Br. pp. 10, 19-21. The Union (Br. p. 14) would distinguish *Babcock & Wilcox* on the grounds that (1) in this case there is "an open area to which the general public . . . is invited"—the "open to the public" argument rejected in *Central Hardware* (407 U. S. at 547); and (2) Hudgens' grant of "easements to . . . [tenants'] employees, agents, customers and invitees" to enter upon the Center—the "open-ended invitation" argument rejected in *Lloyd* (407 U. S. at 565).

tion" will result from a court action in contrast to a Section 7 proceeding. While there may arguably be a "more stringent" showing of inadequate alternatives required under the statutory criteria (Bd. Br. p. 18, n. 12),[6] that test does not necessitate, as does the constitutional standard, any finding that picketing be "directly related in its purpose to the use to which the shopping center property is being put." *Lloyd*, 407 U. S. at 563, quoting *Logan Valley*, 391 U. S. at 320 n. 9.[7] The Act is thus both "broader" and "narrower" than the First Amendment and may provide more, as well as less, protection. *Central Hardware*, 407 U. S. at 548-49 (dissenting opinion); see also Pet. Br. pp. 12-14.

6. Nothing in *Lloyd* suggests that the alternative test of that case is, in fact, less stringent than that of *Babcock & Wilcox* or precludes access only where "there are *purely public locations* [available] where . . . [the desired] activity can be carried on effectively without access to quasi public property." Bd. Br. pp. 31-32 (emphasis added). Indeed, this Court's articulation of the constitutional alternative test, *i.e.*, that access is permitted only where the pickets would otherwise be "deprived of *all reasonable opportunity* to convey their message" (*Lloyd*, 407 U. S. at 566; emphasis added), strongly suggests that it does not differ from the statutory rule.

7. Hudgens has not urged a relationship test because of its belief that *Babcock & Wilcox* is controlling. It does submit, however, assuming such a criterion, that the Court of Appeals' interpretation thereof, advocated by both the Board (Br. pp. 21-24) and Union (Br. pp. 21-23), is erroneous. Primary picketing is necessarily "addressed to the labor policies of the [picketed store]" (Bd. Br. p. 21); to find that this relationship constitutes a sufficient nexus would render the relationship test a nullity in any union picketing case. If geographic origin is irrelevant, and all that is needed is an attempt by the pickets to discourage patronage of the struck establishment (Union Br. p. 23), then any primary picketing would qualify— "[t]he primary strike . . . is aimed at applying economic pressure by halting day-to-day operations of the struck employer." *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492, 499 (1964). A meaningful relationship test must, therefore, focus upon whether there is a labor dispute at the situs of the picketing. See Pet. Br. pp. 16-18. By arguing that the relationship criterion is satisfied merely because potential Butler customers come "within the scope of the broad invitation issued by Hudgens to the public . . ." (Bd. Br. p. 11), the "Respondents' argument . . . misapprehends the scope of the invitation extended to the public." *Lloyd*, 407 U. S. at 564.

B. The Union's Erroneous Approach

1. Although not advocating the Board's "quasi public"-"purely private" dichotomy, the Union proposes a similarly unsound distinction. It proposes one rule for picketing, under which the existence of alternative forums would be irrelevant, and another test for other Section 7 activities, such as organizational campaigns, under which the *Babcock & Wilcox* alternative standard continues to be determinative. This approach presumes that because *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492 (1964), sanctioned "the right to picket at the 'entrance to a struck' employer's premises", *any* limitation thereupon is impermissible. Union Br. pp. 7, 12. This basic assumption, however, is wrong. The right to picket, even on public property, is not absolute. Even peaceful picketing has repeatedly been regulated by either the Act, state law or other limitations imposed "to prevent interference with the use to which the property is ordinarily put . . . [or] the normal use of the public property by other members of the public with an equal right of access to it." *Logan Valley*, 391 U. S. at 320-21.

Picketing, for example, which has a purpose either expressly or impliedly forbidden by the Act,[8] or is otherwise illegally motivated,[9] may be forbidden. Similarly, picketing which involves improper, albeit peaceful, tactics,[10] or is in breach of valid contractual limitations,[11] may also be barred. *Steelworkers,*

8. See, *e.g.*, Sections 8(b)(4), 8(b)(6) and 8(b)(7) of the Act; *H. M. Newman*, 85 NLRB 725 1946) (a primary work stoppage to cause an unlawful discharge violates the Act); and *ABC Prestress & Concrete*. 201 NLRB 820 (1973) (a primary strike to force an employer to grant an illegal wage increase is unprotected by the Act).

9. See, *e.g.*, *Plumbers Local 10* v. *Graham Bros.*, 345 U. S. 192 (1953).

10. See, *e.g.*, *N. L. R. B.* v. *Fansteel Mfg. Co.*, 306 U. S. 240 (1939).

11. See, *e.g.*, *Boys Market, Inc.* v. *Retail Clerks Local 770*, 398 U. S. 235 (1970).

in short, does not stand for the unrestricted right of a union to picket at the entrance to a struck employer's premises. The holding in that case is a limited one; that, particularly where "there was no other place where the union could have brought home . . . its dispute", the "location of the picketing is an important but not decisive factor" in determining whether common situs picketing is precluded by Section 8(b)(4) of the Act. 376 U. S. at 499-500. As the Court was careful to note, this conclusion does not imply the picketing "is in all respects legal but only that it is not forbidden by § 8(b)(4); it would escape neither the provisions of the federal law nor the local if violative thereof." 376 U. S. at 502.

The Union incorrectly claims that "Petitioner's asserted justification" for its exclusion of the pickets was solely the Georgia Criminal Trespass Law. Union Br. pp. 8-12. Hudgens' position is predicated, instead, on a much more fundamental concept: "the long-settled rights of private property protected by the Fifth and Fourteenth Amendment" (*Central Hardware*, 407 U. S. at 547). Trespass laws, of course, provide one means whereby a property owner can effectuate property rights. See, *e.g.*, *Taggart*, 397 U. S. at 227 (Burger, C. J., concurring); *People* v. *Goduto*, 21 Ill. 2d 605, 174 N. E. 2d 385, *cert. den.* 368 U. S. 927 (1961). Additionally, the Act affords protection by requiring that employee rights granted therein must be accommodated with property rights "with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox*, 351 U. S. at 112. Neither Section 7 or property rights, therefore, are absolute. An employer has no more power to create a *cordon sanitaire* to always insulate private property from peaceful primary picketing than he would have to prevent all non-employee union organizational activities thereon. Where reasonable attempts to reach a union's desired audience are shown to be ineffective—*e.g.*, if Butler here had an operation at the Center whose employees or customers truly

could not be reached through other channels of communication—then both Hudgens and Butler's property rights would have to yield. *Id.* at 113. In the converse situation, as in this case, where there are reasonable alternatives to picketing in front of the struck premises, the Union was required to utilize those alternatives. There is, as this Court has stated in other contexts, no unfettered right by a union or anyone else to propagandize one's views whenever and however and wherever one pleases. *Adderley* v. *Florida,* 385 U. S. 39, 48 (1966); *N. L. R. B.* v. *United Steelworkers,* 357 U. S. 357, 363-364 (1958). This principle is as applicable to picketing as it is to other forms of expression.

2. The Union's proposed distinction between "organizing campaign" activities and picketing, with different access criteria dependent on which conduct is involved notwithstanding that the situs may be the same, would also lead to illogical results. There is no clear demarcation between an organizational campaign and picketing; picketing may have an organizational or recognitional objective. Unions frequently attempt through picketing to organize "from the top as distinguished from the accepted organizational technique of attempting to persuade . . . by use of handbills, letters, meetings . . ." I. Legis. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, p. 471. Recognitional picketing, moreover, is an organizational technique fraught with potential abuse (see Section 8(b)(7) of the Act; Meltzer, *Organizational Picketing and the NLRB: Five On A Seesaw*, 30 U. Chi. L. Rev. 78 (1962)) and, as a result, is a less preferred route than the Act's election machinery. *Id.* at 83; see also *Linden Lumber* v. *N. L. R. B.*, 419 U. S. 301, 304, 306 (1974). The Union's proposed rule, however, would permit a non-employee unrestricted access to private property to engage in coercive recognitional picketing while concurrently denying the same individual access, where the *Babcock & Wilcox* test had not been met, to solicit authorization cards or distribute literature for a Board representation election. It

would similarly always permit picketing on private property, as here, to enforce bargaining demands at a distant location while often denying entry to those seeking to organize employees working at the struck site. These incongruous results are hardly compatible with the Congressional desire "to fashion a coherent national labor policy." *N. L. R. B.* v. *Drivers Local Union No. 639,* 362 U. S. 274, 292 (1960).

C. The Babcock & Wilcox Test Was Not Met in This Case

1. The Board does not attempt to demonstrate that the *Babcock & Wilcox* reasonable alternative test has been met in this case. Instead, its position is that "the Union did not have the burden of establishing that it could not have reached the customers of Butler's North DeKalb store by newspaper, television, and radio advertising, direct mailing, or other advertising devices . . . [e]ven if these methods were economical and effective in attracting customers to the shopping center for commercial purposes." Bd. Br. p. 30. *Babcock & Wilcox*, however, does impose the burden on a union to establish a justification for access by showing that reasonable attempts to utilize other alternatives were ineffective. See, *e.g., N. L. R. B.* v. *Kutsher's Hotel and County Club, Inc.*, 427 F. 2d 200, 202 (2nd Cir. 1970); *May Department Stores Company* v. *N. L. R. B.*, 316 F. 2d 797, 800 (6th Cir. 1963); and *S. E. Nichols of Ohio*, 200 NLRB at 1132. This burden cannot be transferred, as already shown, merely because the employer is "clustered with other stores in a modern shopping center. *Lloyd*, 407 at 469; cf. Bd. Br. pp. 30-33.

2. Both the Board (Br. p. 30 n. 23) and the Union (Br. pp. 14-16) also assert, without analysis, that the effectiveness of various methods in attracting customers to the Center would not be effective in keeping the same customers away. Unrebutted expert testimony in this case is to the contrary: such methods would have been both more effective and less expensive than

picketing. App. pp. 177-179. The Union's intended audience was not, as its brief (p. 16) claims, only "that small minority who had identified themselves as potential customers at or near the [Butler Center] store"; it was all employees and potential customers of any of the nine Butler retail stores in the greater Atlanta area. Picketing, in fact, took place at all of these locations as well as at the Butler warehouse where the Union's dispute arose. Pet. App. A2-A3. In these circumstances there is no legitimate reason why the Union could not, as in the admitted case of an advertiser who wishes to induce patronage, "address the entire population in the hope that even a small percentage will [not] patronize [Butler] . . . since that percentage is sufficient to justify the economic expense of the advertisement." Union Br. p. 16.

The alternative means suggested by Hudgens—newspapers, radio, television, picketing and/or handbilling on the public right-of-ways to the Center,[12] and so on—are not unprecedented. In seeking to reach a far more limited audience of employees, even in large metropolitan areas like Milwaukee and Chicago, newspapers, radio and television have been recognized as feasible channels of communication. *The Falk Corporation*, 192 NLRB

12. The Board's contention (Br. pp. 28-29) that the alternative of picketing on the Center's adjacent right-of-ways is not reasonable because of difficulty in reading the picket signs or potential danger to the pickets disregards the record evidence that each entrance to the Center contains a right-of-way sufficient for pickets and requires either a complete stop or a slow turn after a stoplight. App. pp. 105-107, 144-146. Similarly, the contention (Bd. Br. p. 29) that picketing at the entrances to the Center would enmesh neutrals is belied by the Board's own well-established *Sailors' Union of the Pacific* (*Moore Dry Dock Co.*), 92 NLRB 547 (1950), rules regulating common situs picketing. See Pet. Br. p. 20 n. 17. Indeed, the Board recently upheld picketing at the entrance to a multi-enterprise, multi-story office building as "reasonably close to the situs of the dispute", although directed at a tenant primarily located on the fourth floor thereof, stating that "[p]icketing outside the primary's place of business at entrances normally used by the primary's employees, customers and suppliers has always been reasonable under the *Moore Dry Dock* standards." *Wire Service Guild, Local 222*, 218 NLRB No. 186 (July 3, 1975).

716, 721 (1971); *Monogram Models, Inc.*, 192 NLRB 705, 706 n. 5 (1971). No reason has been proffered, either at the hearing, in the opinions below or in the Respondents' briefs, to explain why "Hudgens' testimony as to the low unit cost and the effectiveness of these advertising methods does not demonstrate that they constitute an acceptable substitute for picketing . . . [and] viable alternatives for taking the pickets' message to Butler customers and employees." Pet. App. p. 13.[13] Merely asserting that untried alternatives would be ineffective does not meet the *Babcock* and *Wilcox* burden, particularly where the record reveals "evidence of accessibility had there been reasonable Union efforts to this end." *N. L. R. B.* v. *Kutcher's Hotel and Country Club, Inc.*, 427 F. 2d at 202.

3. At perhaps the crux of the Board and the Union's position is the belief that other alternatives to picketing must *ipso facto* be deemed ineffective, that they simply do not match "picketing at the store entrance either in precision of identification or timeliness." Union Br. pp. 15-16; Bd. Br. pp. 27-28. Even accepting the thesis that picketing constitutes a different type of communicative activity, which evokes a different response than the spoken or printed word, there is, as already shown, no guarantee in the Act that a union have an unrestricted right to picket on private property in order to communicate its message. A union may only resort to picketing where its conduct does not unduly intrude

13. The Union (Br. pp. 17-20) does contend that if a novel balancing calculus, "weighing the financial cost to the property owner of allowing entry against the increased cost to the Union of alternative channels of communications," were utilized, access would be warranted here as on "many occasions." The Union fails to consider, in formulating this calculus, the intangible cost of the "volatile influence on certain audiences" of picketing, and the tangible fact that it "involves customer annoyance and a consequent loss of sales for management" (Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 Minn. L. Rev. 505, 507-08 (1965)) as well as other expenses (App. pp. 130-31, 154-57). In any event, the test is not one of relative cost or convenience but, rather, whether *reasonable* efforts, even if more costly or less convenient, could reach the desired audience. See Pet. Br. pp. 18-19.

upon other competing interests also entitled to recognition. And one of those interests, granted by the same authority that preserves the right to picket, is the right of private property recognized in the Act and protected by the Constitution. Where, as here, other reasonable alternatives are available, those property rights need not yield even in the name of picketing.

III. CONCLUSION

For the reasons stated herein, as well as those set forth in Hudgens' principal brief, Petitioner respectfully prays that this Court reverse the judgment of the Court of Appeals and remand this case to that Court with instructions to deny enforcement to the Board's order.

Respectfully submitted,

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